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No. 01-1234

IN THE

Supreme Court of the United States

JAY COHEN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL FINANCIAL SECTOR REGULATORY AUTHORITY, AN ADMINISTRATIVE AGENCY OF THE GOVERNMENT OF ANTIGUA AND BARBUDA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JAY COHEN

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The International Financial Sector Regulatory Authority ("IFSRA"), an Administrative Agency of the Government of Antigua and Barbuda ("Antigua"), with the consents of the parties, submits this brief *amicus curiae* in support of Jay Cohen, Petitioner in the above-captioned proceedings.

INTERESTS OF *AMICUS* [1]

This case presents issues of critical concern to Antigua. Antigua's economy relies heavily on the economic benefit

[1] Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members and its counsel, contributed monetarily to the preparation or submission of this brief.

that interactive wagering provides. If Antigua is unable to permit interactive wagering subject to strong and comprehensive regulatory controls, the negative impact on the Antiguan economy will be substantial.

SUMMARY OF ARGUMENT

The Court should grant certiorari in this case to address the expansive interpretation of 18 U.S.C. § 371, the federal conspiracy statute, and 18 U.S.C. § 1084 (the "Wire Act") by the United States Court of Appeals for the Second Circuit. The Second Circuit's decision would criminalize not only the activities of American citizens in Antigua, but also activities of non-American citizens engaged in the betting or wagering business from Antigua, suppliers for that business, and even Antiguan governmental officials not protected by the doctrine of Sovereign Immunity.

Should the petition for certiorari not be granted and the present decision be allowed to stand, it would have a very negative impact on the Antiguan economy and hamper the country's efforts to create strong regulatory controls over all interactive wagering.

REASONS FOR GRANTING REVIEW

Amicus curiae IFSRA, Antigua's Internet gaming regulatory agency, adopts Petitioner's Statement of the Case. IFSRA shares Petitioner's concern about the decision of the district court which "deemed irrelevant the testimony of Gyneth McAllister, a government official in charge of Antigua's gaming regulations, who was prepared to testify about the steps taken to set up WSE [World Sports Exchange], Antiguan law in relation to WSE, and her interactions with U.S. officials concerning gaming regulation and with Mr. Cohen himself. A.282-85." Petition for Writ of Certiorari, at 7, n.3.

I.

If the decision under appeal is allowed to stand, the parameters of the federal conspiracy statute and the Wire Act would be uncertain. Would criminal sanctions apply to non-U.S. citizens accepting offshore wagers from within the United States? Would sanctions apply to suppliers of the offshore operators? Would sanctions apply to Antiguan regulators?

It is undisputed that Internet gambling is legal in and regulated by the laws of Antigua. United States courts have reached conflicting conclusions on the efforts of prosecutors against offshore licensed operators. For example, in *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998), the defendants faced a twenty-two count indictment, including charges of conspiracy in violation of 18 U.S.C. §371; illegal gambling, in violation of 18 U.S.C. §1955; and money laundering, in violation of 18 U.S.C. §1956(a)(1)(A)(i) and (a)(1)(B)(i). Defendants had established offshore operations in the Caribbean, but paid winners from Texas. The Court of Appeals reversed the illegal gambling, conspiracy and money laundering convictions because "those convictions all depended on a finding that the appellants engaged in illegal gambling activity." *Id.* at 446. The appellate court concluded that there was no violation of Texas gambling law because defendants had not been charged under the correct statute--possession of bookmaking paraphernalia.

In dicta, the Court stated:

> Perhaps in some circumstances, evidence of callers attempting to place bets, the mere capability to input illegal bookmaking information into the offshore computer, and the other circumstantial evidence might lead to a rational inference that appellants were engaged in illegal bookmaking in Texas. However, looking at the overall circumstances of this case, such an inference is unwarranted. Jones and his co-appellants went to great effort to make sure that their operation was legal. They

> set up offshore offices and consulted with lawyers in the United States and abroad on the legality of their enterprise; they furnished the Caribbean local offices with desks and telephones and staffed them with personnel to accept international phone wagers; they set up separate phone lines that could be used to place bets in the offshore offices. Under these circumstances, without specific evidence of any wrongdoing, it is irrational to conclude beyond a reasonable doubt that after having gone through the effort of fully equipping, staffing and widely advertising the Caribbean offices, the appellants nevertheless illegally accepted bets in the United States.

Id. at 448.

There was no allegation of a violation of the Wire Act in *Truesdale*. But the decision persuasively demonstrates why Antiguan law and the precautions he took should protect Cohen from prosecution. This is especially true in the light of the fact that the United States has worked with the Antiguan government to develop its offshore gaming procedures.

Antigua has comprehensively regulated Internet gambling, which is an essential part of its economic plan. In developing the country's regulatory framework for gaming, Antiguan regulators even met with United States officials to obtain their assistance in establishing a system to better protect the interactive player. (Government of Antigua and Barbuda, "Recommendations on How We Can Better Regulate the Industry to Protect the Player," Report to Prime Minister Lester Bird on Meeting with Mr. Scott Charney and Mr. Jonathan Winer, 21st and 22nd in Washington, D.C., September 30, 1997).

In the present case, Mr. Cohen's lawyers were not permitted a short continuance to take the deposition in Antigua of Gyneth McAllister, the Antiguan official who was the director of offshore gaming and who was too ill to attend the trial. She would have testified, *inter alia*, about her

meeting with Scott Charney, White House Advisor on Computer Fraud and Head of the Computer Fraud Division of the United States Department of Justice, and Jonathan Winer, Deputy Secretary of State, and how the United States government expressed interest in assisting Antigua's development of interactive procedures for player protection.

II.

Antigua is a developing nation of approximately 70,000 residents which relies heavily on tourism and foreign investment. In order to encourage foreign investment, Antigua has set up a Free Trade and Processing Zone to develop and attract industries related to information technology. In fact, "the license fees received from sports book and Internet gaming represent the main source of revenues to the Free Trade Zone," and Internet gaming operators employ about 700 residents. (Antigua and Barbuda Free Trade and Processing Zone, Strategic Plan 2001-2005, at 1-2 (March 2001)).

Many other countries have licensed offshore gambling and wagering. Unlike most, Antigua opted for a strong regulatory approach based on the systems of Great Britain and New Jersey. On May 17, 2001, Antigua amended Section 281(2)(b) of the International Business Corporation Act (which regulates all offshore corporations) to provide that "internet gaming, sports books and virtual casinos from Antigua and Barbuda shall be charged at the rate of three (3%) per centum of the gross handle."

More importantly, on May 22, 2001, the Antiguan government promulgated "Regulations Concerning Interactive Gaming and Interactive Wagering." Those regulations were the result of various meetings of Financial Action Task Force and Anti-Money-Laundering officials and experts, offshore operators, gaming experts and government officials. According to one report in the media, "The scheme broadens

Antigua's monitoring authority of Internet gambling operators and demands more personal disclosures from applicants seeking licenses. But money laundering was the primary focus." (Tony Batt, "Antigua Leading Way in Regulating Internet Gambling," *lasvegas.com* Gaming Wire (April 30, 2001)).

The new regulations created mandatory procedures to verify the age of all potential players (Part VIII), imposed a duty to report dishonest/unlawful acts and suspicious activities (Part XVI), and require exhaustive disclosures for those who wish to obtain (Schedule A) or renew a gaming license (Schedule D). Their basic purpose was to ensure the suitability of all applicants for a gaming or wagering license, the financial solvency of all gaming operations, and the protection of players. Applicants who are unable to establish their suitability or solvency would be denied a license.

IFSRA is the Antiguan agency which has the delegated authority to regulate all offshore corporations pursuant to the International Business Corporations Act. Within this statutory authority, the Directorate of Offshore Gaming is the department that has been assigned the specific regulatory duties. The mission of these authorities is not to promote offshore gaming, but to supervise and regulate it.

The new regulatory scheme includes provisions which are designed to minimize acceptance of "suspicious" bets by licensed operators, enhance player protection, and provide for random inspection of all gaming devices. The regulations also contain safeguards to minimize the possibility of bets by minors.

The protection of minors is very important to Antiguan regulatory authorities, and they have made every attempt in their rules to curb underage betting. In a February 22, 2002 *Chronicle of Higher Education* article, "Blowing the Whistle on Campus Gambling," Arnie Wexler and Marc Isenberg observed that "it may be hard for a student under 21 to buy a

pack of cigarettes or a can of beer, but within 15 minutes he or she can find a student bookie and place a bet." The authors were also critical of the availability of offshore betting opportunities on campus. Again, the Antiguan regulatory structure would make underage betting with any Antiguan licensee extremely difficult.

Almost immediately after Antigua promulgated its strong regime of Internet gaming regulations, Great Britain, in July 2001, lifted its financial advisory on Antiguan banks, which had been in effect since April 1999. ("U.K. Lifts Financial Advisory on Antigua," http://www.Antigua-barbuda.com/news, July 2001). The following month, the United States Department of the Treasury Financial Crimes Enforcement Network withdrew its Advisory 11, a warning regarding Antigua, because Antigua "has enacted significant reforms to its counter-money laundering system, addressing the points noted in Advisory 11, and has taken concrete steps to bring these reforms into effect." (U.S. Treasury Department, FinCen Advisory, Aug. 2001).

Even one of the harshest critics of Internet gambling paid Antigua a backhanded compliment. Testifying on May 31, 2000 before the New Jersey Assembly of Commerce, Tourism, Gaming and Military and Veterans' Affairs Committee on the feasibility of authorizing and regulating Internet gambling in New Jersey, J.P. Suarez, Director of the New Jersey Division of Gaming Enforcement, who later instituted a civil action against 11 offshore operators, confirmed that Antigua had assumed the costs and burdens associated with the strict regulation of gaming:

> In Antigua recently, the minister of their gaming division [Gyneth McAllister] proposed regulations that would do just that. She proposed regulations that would essentially put a device—software, I believe it was—on the computer gamines that would allow her regulators to monitor what's going on in the Antiguan casinos. Well,

> the collective howl of Antiguan operators could be heard across the Caribbean. They're fleeing Antigua and going to a more charitable location that won't require that kind of regulatory oversight.

The outcome of this case will have a substantial impact on Antigua's continuing efforts to develop the kind of regulatory oversight needed to guarantee the integrity of Internet gaming there, which will in turn provide durable benefits to the Antiguan economy.

CONCLUSION

For all of the foregoing reasons, the IFSRA urges that the Court grant the petition for certiorari in this case to address the issues significantly affecting Internet gaming.

Respectfully submitted,

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